

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER M. MASHTARE,)	
)	No. CV-09-0346-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 15.) Attorney Maureen R. Rosette represents Christopher Mashtare (Plaintiff); Special Assistant United States Attorney Kathryn Miller represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff filed for disability insurance benefits (DIB) on August 17, 1995, and Supplemental Security Income (SSI) on February 10, 1995 (Tr. 1, 44-47.) He alleged disability due to residual dysfunction from a childhood head injury with an onset date of April

1 2, 1994. (Tr. 15.) Benefits were denied initially and on
2 reconsideration. Plaintiff timely requested a hearing before an
3 administrative law judge (ALJ), which was held before ALJ Bergtholdt
4 on May 27, 1997. (Tr. 246-77.) A continuation of the hearing was
5 held on May 27, 1998. (Tr. 279-87.) At these hearings, Plaintiff,
6 medical expert Scott Mabee, Ph.D., and vocational expert Daniel
7 McKinney testified. The ALJ denied benefits on June 18, 1998. (Tr.
8 12-25.) Plaintiff appealed the Commissioner's final decision and,
9 on October 10, 2002, as stipulated by the parties, the United States
10 District Court for the Eastern District of Washington remanded the
11 matter to the Commissioner for additional proceedings pursuant to
12 sentence four of 42 U.S.C. § 405(g). (Tr. 317-18, 319-20.)

13 On remand, supplemental hearings were held before ALJ Mary Reed
14 on January 13, 2004, and May 27, 2004. (Tr. 366-421.) Plaintiff,
15 who was represented by counsel, medical expert Allen D. Bostwick,
16 Ph.D. and vocational expert Debra LaPoint (VE) testified at the May
17 2004 hearing. (*Id.*) The alleged closed period of disability was
18 amended to September 1, 1994, through May 1, 1998, the date
19 Plaintiff resumed work activity at substantial gainful levels. (Tr.
20 311.) ALJ Reed denied benefits on November 8, 2004, and the Appeals
21 Council denied review. (Tr. 300-13, 288-93.) The instant matter is
22 before this court pursuant to 42 U.S.C. § 405(g).

23 STANDARD OF REVIEW

24 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
25 court set out the standard of review:

26 A district court's order upholding the Commissioner's
27 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
28 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
Commissioner may be reversed only if it is not supported

1 by substantial evidence or if it is based on legal error.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
3 Substantial evidence is defined as being more than a mere
4 scintilla, but less than a preponderance. *Id.* at 1098.
5 Put another way, substantial evidence is such relevant
6 evidence as a reasonable mind might accept as adequate to
7 support a conclusion. *Richardson v. Perales*, 402 U.S.
8 389, 401 (1971). If the evidence is susceptible to more
9 than one rational interpretation, the court may not
10 substitute its judgment for that of the Commissioner.
11 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
12 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

13 The ALJ is responsible for determining credibility,
14 resolving conflicts in medical testimony, and resolving
15 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
16 Cir. 1995). The ALJ's determinations of law are reviewed
17 *de novo*, although deference is owed to a reasonable
18 construction of the applicable statutes. *McNatt v. Apfel*,
19 201 F.3d 1084, 1087 (9th Cir. 2000).

20 It is the role of the trier of fact, not this court, to resolve
21 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
22 supports more than one rational interpretation, the court may not
23 substitute its judgment for that of the Commissioner. *Tackett*, 180
24 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
25 Nevertheless, a decision supported by substantial evidence will
26 still be set aside if the proper legal standards were not applied in
27 weighing the evidence and making the decision. *Browner v. Secretary*
28 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
there is substantial evidence to support the administrative
findings, or if there is conflicting evidence that will support a
finding of either disability or non-disability, the finding of the
Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
requirements necessary to establish disability:

1 Under the Social Security Act, individuals who are
2 "under a disability" are eligible to receive benefits. 42
3 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
4 medically determinable physical or mental impairment"
5 which prevents one from engaging "in any substantial
6 gainful activity" and is expected to result in death or
7 last "for a continuous period of not less than 12 months."
8 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
9 from "anatomical, physiological, or psychological
10 abnormalities which are demonstrable by medically
11 acceptable clinical and laboratory diagnostic techniques."
12 42 U.S.C. § 423(d)(3). The Act also provides that a
13 claimant will be eligible for benefits only if his
14 impairments "are of such severity that he is not only
15 unable to do his previous work but cannot, considering his
16 age, education and work experience, engage in any other
17 kind of substantial gainful work which exists in the
18 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
19 the definition of disability consists of both medical and
20 vocational components.

21 In evaluating whether a claimant suffers from a
22 disability, an ALJ must apply a five-step sequential
23 inquiry addressing both components of the definition,
24 until a question is answered affirmatively or negatively
25 in such a way that an ultimate determination can be made.
26 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
27 claimant bears the burden of proving that [s]he is
28 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

29 The Commissioner has established a five-step sequential
30 evaluation process for determining whether a person is disabled. 20
31 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
32 137, 140-42 (1987). In steps one through four, the burden of proof
33 rests upon the claimant to establish a prima facie case of
34 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
35 920, 921 (9th Cir. 1971). This burden is met once a claimant
36 establishes that a physical or mental impairment prevents her from
37 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),
38 416.920(a). At step five, the burden shifts to the Commissioner to

1 show that (1) the claimant can perform other substantial gainful
2 activity; and (2) a "significant number of jobs exist in the
3 national economy" which claimant can perform. 20 C.F.R. §§
4 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
5 1498 (9th Cir. 1984).

6 **STATEMENT OF THE CASE**

7 The facts of the case are set forth in detail in the transcript
8 of proceedings and are briefly summarized here. At the time of the
9 first hearing before ALJ Bergtholdt in 1997, Plaintiff was 24 years
10 old. (Tr. 252.) Plaintiff had resumed working part time two weeks
11 before the 1997 hearing, as a janitor, and testified he was still
12 working when he appeared at the 1998 hearing. (Tr. 251, 253.) In
13 1997, Plaintiff testified he had suffered a head injury during a
14 sledding accident when he was about ten years old. (Tr. 255-56.)
15 He reported the injury caused temporary blindness and amnesia and
16 required brain surgery. (Tr. 206, 255.) Plaintiff testified he
17 attended special education classes, culinary arts classes, and
18 graduated from high school. After high school he worked for a
19 nursing home, janitorial service and as prep cook. (Tr. 254.) He
20 stated he could not work between 1994 and 1997 because of episodic
21 ataxia (imbalance) that required him to sit down for 45 minutes to
22 an hour. He also testified he had knee and wrist problems and
23 severe headaches. (Tr. 255-57.) At the 2004 hearing before ALJ
24 Reed, Plaintiff testified he had been working since 1997, (Tr. 357),
25 and had learned to deal with the ataxia by sitting down before he
26 lost balance. However, he also testified his knees and left hand
27 grip problems and mental state were still the same as they were
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1 during the alleged closed period of disability. (Tr. 400-02, 405.)

2 **ADMINISTRATIVE DECISION**

3 At step one, ALJ Reed found Plaintiff was requesting a closed
4 period of disability beginning September 1, 1994 through May 1,
5 1998. (Tr. 311.) She found he had resumed substantial gainful
6 activity by February 1998. (*Id.*) At step two, she found Plaintiff
7 had severe mental impairments and a severe impairment of ataxia.
8 (Tr. 312.) At step three she found these impairments did not meet
9 or medically equal one of the listed impairments in 20 C.F.R.,
10 Appendix 1, Subpart P, Regulations No. 4 (Listings). (*Id.*)
11 Referencing evidence of inconsistent statements, exaggerations, and
12 the lack of formal treatment for the alleged symptoms, ALJ Reed
13 found Plaintiff not credible. (Tr. 308, 312.) At step four, she
14 determined Plaintiff had the residual functional capacity (RFC) to
15 perform work at all exertional levels, with the following non-
16 exertional limitations:

17 [H]e is limited to work requiring the ability to
18 understand, carry out and remember no more than simple
19 instructions; he is able to read at a fifth grade level
20 and perform simple math calculations, but would require a
21 calculator for more complex math calculations; he would do
22 best learning tasks that were demonstrated or shown to him
and verbally explained, and where new tasks could be
presented to him in a low stimuli environment. In
addition, the claimant is required to avoid work at
unprotected heights, or requiring climbing ropes, ladders
and scaffolds.

23 (Tr. 312.) Based on VE testimony and the RFC determination, the ALJ
24 found Plaintiff's limitations did not preclude performance of his
25 past work as a janitor, prep cook, kitchen helper and warehouse
26 worker. (*Id.*) She concluded Plaintiff was not under a disability
27 as defined by the Social Security Act, during the alleged closed
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1 period at issue. (*Id.*)

2 **ISSUES**

3 The question is whether the ALJ's decision is supported by
4 substantial evidence and free of legal error. Plaintiff argues the
5 ALJ erred when she relied on the opinions of a non-examining medical
6 expert, and did not give specific, legitimate reasons for rejecting
7 the conflicting opinions of his examining psychologists. He
8 contends if the erroneously rejected medical opinions are credited
9 properly, VE testimony supports a finding of disability. (Ct. Rec.
10 14 at 14-15.)

11 **DISCUSSION**

12 **Evaluation of Medical Source Opinions**

13 In disability proceedings, the ALJ evaluates the medical
14 evidence submitted and must explain the weight given to the opinions
15 of accepted medical sources in the record. The Regulations
16 distinguish among the opinions of three types of accepted medical
17 sources: (1) sources who have treated the claimant; (2) sources who
18 have examined the claimant; and (3) sources who have neither
19 examined nor treated the claimant, but express their opinion based
20 upon a review of the claimant's medical records. 20 C.F.R. §§
21 404.1527, 416.927. A treating physician's opinion carries more
22 weight than an examining physician's, and an examining physician's
23 opinion carries more weight than a non-examining reviewing or
24 consulting physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587,
25 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
26 1995).

27 In his determination of disability, the Commissioner must
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1 provide "clear and convincing" reasons for rejecting the
2 uncontradicted opinion of a treating or examining physician.
3 *Lester*, 81 F.3d at 830. If the medical opinion is contradicted, it
4 can only be rejected for specific and legitimate reasons that are
5 supported by substantial evidence in the record. *Andrews*, 53 F.3d
6 at 1043. In evaluating medical evidence, "the ALJ can meet [his or
7 her] burden by setting out a detailed and thorough summary of the
8 facts and conflicting clinical evidence, stating [his or her]
9 interpretation thereof, and making findings." *Magallanes v. Bowen*,
10 881 F.2d 747, 751 (9th Cir. 1989) (quoting *Cotton v. Bowen*, 799 F.2d
11 1403, 1408 (9th Cir. 1986)).

12 Historically, the courts have recognized conflicting medical
13 evidence, the absence of regular medical treatment during the
14 alleged period of disability, and the lack of medical support for
15 doctors' reports based substantially on a claimant's subjective
16 complaints of pain as specific, legitimate reasons for disregarding
17 an examining physician's opinion. *Flaten v. Secretary of Health and*
18 *Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair v. Bowen*,
19 885 F.2d 597, 604 (9th Cir. 1989). Rejection of an examining medical
20 source opinion is specific and legitimate where the evidence shows
21 the medical source's opinion is not supported by his own medical
22 records and/or objective data. *Tommasetti v. Astrue*, 533 F.3d 1035,
23 (9th Cir. 2008). The claimant's credibility is also an appropriate
24 factor weighed in the evaluation of medical evidence. See *Webb v.*
25 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005). Medical opinions based
26 on a claimant's subjective complaints may be rejected where the

1 claimant's credibility has been properly discounted.¹ *Tonapetyan v.*
2 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).

3 Plaintiff contends the ALJ did not give specific and legitimate
4 reasons for rejecting opinions of examining psychologists of Clay
5 Jorgensen, Ph.D. and Dennis Pollack, Ph.D. and Deborah Brown,
6 examining mental health therapist.² He claims it was legal error
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8
9 ¹ The ALJ's detailed credibility findings are specific, "clear
10 and convincing" and unchallenged. (Tr. 307-09.) She properly
11 referenced instances of inconsistency between Plaintiff's statements
12 to medical providers, as well as a lack of medical evidence to
13 support his allegations of temporary blindness, coma,
14 musculoskeletal pain, and knee swelling. (Tr. 308.) These are
15 proper reasons for rejecting a claimant's statements. See e.g.
16 *Flaten*, 44 F.3d at 1463-64.

17 ² Ms. Brown was not a licensed psychologist in 1994 and 1995,
18 when she examined Plaintiff and completed the psychological
19 evaluation reports at issue. (Tr. 210-13, 181-84.) Further, the
20 evidence does not establish that she was under the direct
21 supervision of a licensed psychologist. Because she was not a
22 licensed psychologist, and therefore not an "acceptable medical
23 source" under the Regulations, her opinions are not given as much
24 weight as the opinions of Drs. Jorgensen, Pollack, and Bostwick. 20
25 C.F.R. §§ 404.1513(a)(2), (d), 416.913(a)(2), (d). Although the ALJ
26 is required to consider opinions from mental health therapists, they
27 may be rejected with reasons "germane" to the examiner. *Dodrill v.*
28 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). Here, the ALJ considered

1 for the ALJ to base her determination on Dr. Bostwick's testimony
2 because he was a non-examining psychologist. However, courts have
3 upheld an ALJ's decision to reject the opinion of an examining
4 physician based in part on the testimony of a non-examining medical
5 advisor. *Lester*, 81 F.3d at 831. The analysis and opinion of an
6 expert selected by an ALJ may be helpful in his adjudication, and
7 the court should not second guess the ALJ's resolution of
8 conflicting medical testimony. *Andrews*, 53 F.3d at 1041;
9 *Magallanes*, 881 F.2d at 753. Further, testimony of a medical expert
10 may serve as substantial evidence when supported by and consistent
11 with other evidence in the record. *Id.* If the relied upon medical
12 expert testimony is supported by substantial evidence, the ALJ's
13 decision must be upheld, even where the evidence is susceptible to
14 more than one rational interpretation. *Andrews*, 53 F.3d at 1039-40.

15
16 *De novo* review of the medical records, Plaintiff's testimony in
17 1997 and 2004, and Dr. Bostwick's detailed and comprehensive
18 _____
19 the evaluations completed by Ms. Brown, (Tr. 305), as well as Dr.
20 Bostwick's testimony regarding her use of the Shipley screening tool
21 as a measure of cognitive functioning without factoring in the
22 effects of a learning disability on the test results. (See Tr. 181,
23 210.) The ALJ noted Dr. Bostwick's testimony and found Dr. Brown's
24 results were found less reliable than Dr. Jorgensen's battery of
25 psychological tests. (Tr. 307.) The ALJ did not err in her
26 consideration of Ms. Brown's opinions.

1 testimony regarding the objective testing results and opinions of
2 the examiners indicates the ALJ's summary and interpretation of the
3 medical evidence reflects a reasonable resolution of conflicts in
4 the medical evidence. As directed by this court, ALJ Reed called a
5 medical expert to assist her in re-evaluating the medical sources
6 opinions, "including those of Dr. [sic] Brown, Dr. Pollack and the
7 medical expert." (Tr. 319.) As noted by the ALJ in her decision,
8 Dr. Bostwick's assessment "was based on consideration of the
9 conflicting psychological test results, together with the claimant's
10 behavior and history, his pattern of behavior and a longitudinal
11 view of the evidence." ³ (Tr. 307.)

12 In her discussion of Dr. Bostwick's testimony, the ALJ
13 effectively rejected examining medical opinions that were
14 contradicted and/or unsupported by the evidence. As the Ninth
15 Circuit has emphasized, the ALJ is not required to recite specific
16 words in rejecting medical opinions. *Magallanes*, 881 F.2d at 755.
17 On review, the court can read the adjudicator's summary of the
18 evidence and draw inferences. *Id.* Here, based on the ALJ's summary
19 of the medical evidence, (Tr. 303-06), and her explanation of Dr.

21 ³ It is noted on review that Dr. Bostwick's testimony and
22 certificate of qualifications indicate he has additional training
23 and expertise in neuropsychological evaluations. (Tr. 356, 392.)
24 As a specialist in the field of neuropsychology, his opinions are
25 given a more weight than to medical sources who are not specialists.
26 20 C.F.R. §§ 404.1527(d)(5), 416.927(d)(5).

1 Bostwick's detailed assessment of objective test results and
2 observations by the examiners, the court can draw inferences
3 regarding the ALJ's reasoning.

4 For example, the court reasonably can infer from the ALJ's
5 findings that she rejected Dr. Jorgensen's diagnosis of panic
6 disorder because it was based on Plaintiff's self report and there
7 is no evidence to support an "enduring anxiety disorder." (Tr. 306.)
8 This reason is supported by the rest of the record. (See e.g., Tr.
9 184, 207-08, 213, 223 (no unusual anxiety symptoms reported), 269
10 (Dr. Mabee's concurring expert testimony in 1997).) The ALJ also
11 specifically rejected Dr. Pollack's diagnosis of personality
12 disorder and marked limitations because the opinions are not
13 supported by other objective testing, Dr. Pollack's own narrative
14 report, other examiner observations, or Plaintiff's self report.
15 (Tr. 306-07, 222-25.) Further, as supported by the longitudinal
16 record, Dr. Bostwick noted Plaintiff had a history of good social
17 functioning. (Tr. 307.) Plaintiff does not reference evidence in
18 the record to controvert this finding. However, the step two
19 finding of "severe mental impairments" indicates the diagnoses of
20 dementia and cognitive disorders from the head injury identified by
21 Drs. Jorgensen and Pollack and Ms. Brown were accepted by the ALJ.
22 (Tr. 209, 212, 225.)

23 ALJ Reed's determination that Plaintiff was not disabled, as
24 defined by the Social Security Act, during the alleged closed period
25 of disability reflects a reasonable interpretation of her
26 independent assessment of the record in its entirety, Dr. Bostwick's
27 testimony, as well as Plaintiff's credible testimony. As stated by
28

1 Plaintiff at the 2004 hearing, his ataxia and need to rest were the
2 main reasons he could not work during the alleged closed period of
3 disability. (Tr. 408-09.) However, he then testified these
4 conditions had "not really" changed since 1994-96. (Tr. 409.)

5 Because the medical evidence supports Dr. Bostwick's expert
6 testimony in which he explained neurological testing and modes of
7 interpretation, it is considered substantial evidence. (Tr. 379-
8 92.) The ALJ properly relied on his expertise to assist her in
9 resolving the conflicting medical opinions. *Andrews*, 53 F.3d at
10 1041.

11 CONCLUSION

12 The Commissioner's determination of non-disability is supported
13 by substantial evidence and free of legal error. Accordingly,

14 IT IS ORDERED:

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
16 **DENIED;**

17 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
18 **GRANTED.**

19 The District Court Executive is directed to file this Order and
20 provide a copy to counsel for Plaintiff and Defendant. Judgment
21 shall be entered for Defendant, and the file shall be **CLOSED.**

22 DATED January 4, 2011.

23
24 s/ CYNTHIA IMBROGNO

25 UNITED STATES MAGISTRATE JUDGE
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